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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 526

UNITED STATES OF AMERICA, PETITIONER

v.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 26) and the opinion of the same court on petition for rehearing (R. 31) are reported in 27 F. (2d) 782.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 7, 1928. (R. 29.) Petition for rehearing was denied September 12, 1928. (R. 31–32.) The jurisdiction of this Court is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION

The question presented is whether an action on a bond given to stay the collection of a tax pending consideration of a claim for abatement is barred after expiration of the period of limitation prescribed by law on suits for collection of taxes.

STATEMENT

The facts in the case, together with the assignments of error, are set forth in the petition. The relevant portions of the statutes are attached as an appendix.

The petition for certiorari has already been filed. At that time it was believed that substantially the same question as is presented in this case had been certified to this Court by the United States Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Maryland Casualty Company*, No. 399, October Term, 1928, and hence, no supporting brief was filed. However, since the filing of the petition in this case, the United States Circuit Court of Appeals for the Ninth Circuit has determined to ask withdrawal of its certificate in No. 399 because of mistaken reference in it to inapplicable statutes and motion to withdraw the certificate will be submitted December 10th. Since the question is not pending in the *Maryland Casualty Company case*, it now seems necessary, with the permission of the Court, to file this supporting brief.

ARGUMENT

It is submitted that the Circuit Court of Appeals has erred in holding that this action is barred by the statutes of limitations. The question is of manifest importance. It has been before several of the courts and there has been a diversity of opinion. The cases in the United States District Courts holding that the statute of limitations with respect to suits to collect taxes applies to suits on bonds given to secure payment of taxes pending the determination of claims in abatement are:

United States v. *The Maryland Casualty Company* (unreported; District Court for the Northern District of California), *United States* v. *Good Springs Anchor Company and Fidelity & Deposit Company* (unreported; District Court for the Southern District of California).

In the following District Court cases the contention of the United States has been sustained: *United States* v. *Onken Bros. Company, Inc.* (23 F. (2d) 367; Wyoming), *McCaughn, Collector,* v. *Philadelphia Barge Company* (27 F. (2d) 628; Eastern District of Pennsylvania), *United States* v. *Rennolds,* 27 F. (2d) 902; District Court for the Southern District of New York.

This is an action by the United States based upon the breach of a bond executed and delivered by respondents in consideration of the petitioner refraining from and suspending collection of income and profits taxes which had theretofore been assessed

against the John Barth Company for the year 1918, pending consideration of certain claims in abatement.

There was no time limit fixed by law for decision on the claim for abatement. The assessment had already been made and the action of the Commissioner in passing on the claim for abatement is not the making of an assessment.

Respondents demurred to the complaint for the reason that the action was not commenced within the time limited by law as prescribed by Section 250 (d) of the Revenue Acts of 1918, and 1921; Sections 277 (a) (2), 278 (d) and 278 (e) of the Revenue Act of 1924, and Sections 277 (a) (3), 278 (d), 278 (e), and 1106 (a) of the Revenue Act of 1926. (R. 8.) Those are statutes of limitations which provide that no suit or proceeding for the collection of income and profits taxes shall be begun after the expiration of the specified period.

The United States contends that the action is one on contract occasioned by the breach of a bond specifically provided for in the statute; that the making of the bond gave the United States a new cause of action separate and distinct from an action to collect taxes, which it already had; that the statutes set up to bar the action can not be extended by implication to reach a proceeding which is not a suit to collect taxes; and that in any event the benefits of such statute were necessarily waived by the obligors on the bond, since the statute providing for the bond contemplated a postponement of col-

lection which is entirely inconsistent with the application of statutes adopted "in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors". *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, 350.

The bond was conditioned for the payment of such tax as the Commissioner found to be due on consideration of the claim for abatement. No suit could be maintained on the bond until the abatement claim was decided, and there was no time limit for that decision.

There is no merit in the contention made in respondents' brief in opposition that "the question involved in this case is of singularly narrow compass." (Br. 3.) There is no substantial difference between the questions arising in this case and those arising in connection with bonds given under other statutes to postpone collection. Such bonds are of common occurrence and prior to the Revenue Act of 1924 the practice had grown up of accepting abatement bonds generally, whether or not specifically provided for by the statute. Congress evidently recognized that decisions upon claims in abatement are of present importance because the Revenue Act of 1928 provides in Section 611 that if a claim in abatement was filed with or without a bond and if the collection of the tax was stayed, then the defense of the statute of limitations is withdrawn in so far as it affects collections actually made after the prescribed period.

In their brief in opposition (p. 2) respondents insist that the distinguishing feature of this case is that the Commissioner of Internal Revenue made no determination of any tax nor found any tax to be due until after the period of limitation provided for in the Revenue Acts had elapsed.

In the state of the pleadings, the allegations of the bill of complaint must be taken to be true. It shows that the Commissioner duly assessed income and profits taxes against The John Barth Company for the year 1918 on June 25, 1919. (R. 4.) That was the same year the return was filed and well within the statutory period upon which respondents rely. It is therefore clear that the foregoing statement in the brief in opposition is incorrect if intended to relate to an assessment before the bond was given. The case can not, therefore, be distinguished from those where bond was given after additional assessment. Furthermore, it is submitted that the instant case can not be distinguished from the contrary decisions enumerated in the petition by any such circumscribing of the issues. The fundamental question in all of these cases is whether or not a suit of this character is one to collect taxes which must be brought within the period prescribed by the statutes of limitations in the various Revenue Acts. The question of whether those statutes are applicable is common to all of the cases and should this Court decide that those statutes are not to be extended to a suit of this character the decision in this case will be controlling.

If this Court should decide that those statutes are applicable to this case and that Section 1106 (a) of the Revenue Act of 1926 has operated to extinguish the liability, there would then arise the question whether the retroactive repeal of Section 1106 (a) by Section 612 of the Revenue Act of 1928 is unconstitutional, as held by the court below. This action by Congress will give rise to many administrative difficulties in the Treasury Department and presents another important question of Federal law which has not been but should be settled by this Court.

The decision of the Circuit Court of Appeals in this case is inconsistent in that it seems to recognize that an additional cause of action was created by the execution of the bond but holds nevertheless that this additional remedy is subject to the same statutory bar as the original cause of action. This is contrary to the doctrine that where there are several causes of action open to a plaintiff the fact that one has become barred will not affect his right to any of the others which are not barred. *Southern Pac. R. R. Co.* v. *United States*, 200 U. S. 341; *United States* v. *Whited & Wheless*, 246 U. S. 552.

In this case it is conceded that the tax was imposed by the Revenue Act of 1918 and the question is whether the claim of the United States has become barred by its statute of limitations. Such a question in the event of ambiguity or uncertainty should be resolved in favor of the United States. *Bowers* v. *New York & Albany Lighterage Com-*

pany, 273 U. S. 346, 349; *United States* v. *St. Paul, M. & M. Ry. Company*, 247 U. S. 310; *In Re McClure Company*, 21 F. (2d) 538, 540. The Circuit Court of Appeals held that the question is doubtful but failed to apply the rule that the United States is not bound by a statute of limitations unless the intention of Congress that it should be bound is clearly manifested. It is therefore submitted that the decision is in conflict with applicable decisions of this Court.

CONCLUSION

The questions in this case are of general importance, and there are a large number of similar cases pending. A determination in this case that the statutes of limitations are not applicable to a suit of this character will be controlling in all of the other cases. Should this Court determine that such statutes are applicable, the question of the constitutionality of Section 612 of the Revenue Act of 1928, which repealed Section 1106 (a) of the Revenue Act of 1926, will be presented.

It is therefore respectfully submitted that this is a case which calls for the exercise of this Court's power of supervision and that the petition for certiorari should be granted.

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DECEMBER, 1928.